Supreme Court, U.S.
FILED

97 - 1 MAR 18 1997

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

L. Alston; ASIAPRINT; LTD.; Gloria Baron; Robert Basist; Mellisse Brydges; Yolanda DeSoto; Dwaine Dirks; Elsie Dirks; Michael Dymond; Corine Frevert; Patricia Karageorge; Theresa Lauber; Karen Lawson; Lottie Lawson; Thomas Lawson; Jim Martin; Donna McConnell; Steven Nason; John Provost; Eugene Sanchez; Don Sherbo; Marilyn Summers; Patricia A. Taylor; Evelyn Tinney; Richard Welker; and Suzanne Woods.

Petitioners,

VS.

State of Arizona, ex rel. Richard C. Houseworth, Superintendent of Banks (or his successor),

Respondent.

On Petition For Writ Of Certiorari
To The Arizona Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Brenda Jeane Lee
Counsel of Record
655 North Alvernon, Suite 112
Tucson, Arizona 85711
(520) 322-5575

65 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the United States Constitution, 14th Amendment, protect the general creditors of a state court receivership during the administration of the estate and disposition of their interests therein?

2. Where a state court appointed receiver erroneously determines priorities and distributes estate assets to creditors who lacked a perfected security interest therein, without first providing notice and opportunity to be heard to the other general creditors, does it violate due process to deny these injured general creditors a legal remedy?

3. Does the fact that a receiver is under state court supervision confer upon the receiver absolute immunity against liability for negligence and breaches of fiduciary duty, where such injurious actions were taken without the notice to the injured general creditors that due process requires?

4. Does it comport with due process standards to confer absolute immunity upon a receiver by virtue of there being a court order approving the receiver's action, where the order itself was obtained by the receiver without providing notice and an opportunity for the general creditors to be heard?

LIST OF PARTIES

Petitioners:

L. Alston; ASIAPRINT; LTD.; Gloria Baron; Robert Basist; Mellisse Brydges; Yolanda DeSoto; Dwaine Dirks; Elsie Dirks; Michael Dymond; Corine Frevert; Patricia Karageorge; Theresa Lauber; Karen Lawson; Lottie Lawson; Thomas Lawson; Jim Martin; Donna McConnell; Steven Nason; John Provost; Eugene Sanchez; Don Sherbo; Marilyn Summers; Patricia A. Taylor; Evelyn Tinney; Richard Welker; and Suzanne Woods.

Note: The following parties, who were appellants below, are not petitioners to this court:

CANYON STATE EQUITY a/k/a CANYON STATE EQUITY, INC.; Muriel Gray; Boniface Herrman; Steven Ketchel; and Gregg Sasse.

Respondent:

State of Arizona, ex rel. Richard C. Houseworth, Superintendent of Banks (or whichever other individual may be the Superintendent of Banks at this time).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED IN CASE 1

STATEMENT OF THE CASE

1. Facts and Proceedings in the Superior Court of the State of Arizona 2

2. Proceedings Before the Arizona Court of Appeals 9

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED 18

1. Granting The Receiver Immunity From Liability For Negligent Acts It Took Without Notice To The Petitioners Violates Their Constitutional Protection Against Deprivation Of Property Without Due Process Of Law 19

2. The Arizona Court Of Appeals' Holding That The Petitioners Are To Be Charged With Notice Of The Receivers' Improper Transactions Is Without Basis In Fact Or Law And Violates Petitioners' Due Process Rights 24

Conclusion 28

Appendix A: Memorandum Decision of the Arizona Court of Appeals 31

Appendix B: Appointing Order 45

Appendix C: Receiver's Petition "3" 53

TABLE OF AUTHORITIES

CASES

Acevedo v. Pima County Adult Probation Dept. 142 Ariz. 319, 690 P.2d 38 (1984).....19
Adams v. State of Arizona, 185 Ariz 440, 916 P.2d 1156 (App. 1996)...17,19
Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606 (1993).....23
Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724 (1956).....25
First Empire Bank v. F.D.I.C., 572 F.2d 1361 (9th Cir.1978).....14
Flynn v. Rogers, 172 Ariz. 62, 834 P.2d 148 (1992).....14
Fugazy Travel Bureau Inc. v. State, 188 So.2d 842 (Fla.App.1966).....11
Honeyman v. Hanan, 302 U.S. 375, 58 S.Ct. 273 (1938).....25
Jackson v. Smith, 254 U.S. 586, 41 S.Ct. 200 (1921).....11
Kermit Constr. Corp v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1 (1st Cir.1976).....23
Koester v. Citizens' Publishing Co., 151 S.E. 452 (S.C.1930) 9
Koontz v. Northern Bank, 83 U.S. 196 (1872).....11
Kurtz v. T & W Inv. Co., 588 F.2d 801 (10th Cir.1978).....23
Lambert v. California, 355 U.S. 225, 355 S.Ct. 240 (1957).....18
Lambert v. National Hog Co., 106 A. 541 (Pa.1919).....9-10
Lavit v. Superior Court, 173 Ariz. 96, 839 P.2d 1141 (App.1984).....19

Malley v. Briggs, ___ U.S.___,
106 S.Ct 1092 (1986).....23
Mauer v. George B. Spearin, Inc.,
187 A. 47 (N.J.App.1936).....10
Metropolitan Trust Co. v. Lake Cities
Elect. Ry. Co., 100 F.2d 879(1900)..11
Modart Inc. v. Penrose Indust. Corp.
293 F.Supp. 1116 (1967).....11
Mortimer v. Pacific States S & L Co.,
145 P.2d 733 (Nev.1944) 11
Mountain States Tel. & Tel. Co. v.
Kelton, 79 Ariz. 126,
285 P.2d 168 (1955).....15
Naslund v.Moon Motor Car Co.,
134 S.W.2d 102 (Mo.1939).....13
New Alaska Dev. Corp. v. Guetschow,
869 F.2d 1298 (9th Cir.1989).....23
Pehlan v. Middle State Oil Corp.,
154 F.2d at 978 (1946).....13,15
Pemberton Lumber & M. Ind. v.
Wm. R. Ridgeway Const. Co.,
118 A.2d 873 (N.J.App.1955).....11
People v. Family Fund Soc.,
52 N.Y.S. 867, (1898).....12
Progress Press Brick & Machine Co. v.
Sprague, 65 S.W.2d 154(1933).....10
Property Management & Invs., Inc. v.
Lewis,752 F.2d 599 (11th Cir.1985)..23
Schroeder v. City of New York,
371 U.S. 208, 83 S.Ct. 279 (1962)...25
St. Joseph Loan & Trust Co. v.
Studebaker Corp., 66 F.2d 151(1933).10
Sutton v. Zewadski, 70 So. 433
(Fla.1915).....15
Union Trust Co. v. Illinois M. Ry. Co.,
117 U.S.434, 6 S.Ct. 809.....9

United States ex rel. Willoughby v. Howard, 302 U.S. 445, 58 S.Ct. 309 (1937).....11
Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956).18,25
Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538 (9th Cir.1987).....14
Yamoto v.Santa Cruz County Bd. of Supervisors, 124 Ariz. 538, 606 P.2d 28 (App.1979).....19

STATUTES AND RULES

The Constitution of the United States, Amendment 14, Section 1 1
28 U.S.C. 1257(a) 1
U.C.C. 9-304 5
U.C.C 9-305 6
Rule 10, Rules of Supreme Court 1
Rule 12(b), Ariz.R.Civ.Proc.....8
Rule 12(b), Fed.R.Civ.Proc.....8

OTHER AUTHORITIES

Clark, A Treatise on the Law of Receivers, 3d ed.....5

OPINIONS BELOW

The Memorandum Decision of the Arizona Court of Appeals is not reported. A copy is provided in Appendix A.

JURISDICTION

The Memorandum Decision of the Arizona Court of Appeals was filed on March 5, 1996. The Supreme Court of the State of Arizona denied the Petition For Review by Order dated December 18, 1996. This Petition for Writ of Certiorari was timely filed within 90 days thereof. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. 1257(a) and Rules 10(b) and (c) of its rules.

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED IN THIS CASE

The Constitution of the United States, Amendment 14, Section 1, states in part:

...nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

1. Facts and Proceedings in the Superior Court of the State of Arizona.

This case arises out of the receivership of Centuras Investment Company (Centuras), a mortgage bank licensed by the State of Arizona. On December 7, 1987, the Arizona Superior Court ordered that Centuras be placed into receivership. The Arizona Superintendent of Banks was appointed Receiver. The Appointing Order set forth the Receiver's duties.[1]

The present Petitioners were investors with Centuras. Because their investments were unsecured they became general creditors

---

[1] The Appointing Order appears as Appendix B to this Petition. Article 2 required the Receiver to:

> Conserve, hold and manage all receivership properties in order to prevent loss, damage and injury to creditors and others who have done business with CIC; to obtain an accounting thereof, and to adjust and protect the interests of such creditors and other persons doing business with CIC, as approved by the Court;

Article 7 imposed other duties:

> The Receiver is to present to this Court... A written report reflecting the existence and value of all receivership properties...The extent of liabilities.. ...the receiver's report shall include a recommendation regarding the best method for liquidation of CIC [Centuras].

of the Centuras receivership estate.[2] The Petitioners' claims against the estate were acknowledged by the Receiver.[3]

For over four years the Petitioners were given no information concerning administration of the receivership estate. This was not for lack of trying, as the Petitioners made many inquiries by letter and telephone to the Receiver's office.[4]

---

[2] The present Petitioners are only some of the general creditors of Centuras. They share in common the due process based claims made in this Petition.

[3] A copy of the Receiver's letter to the Petitioners was attached to their Reply Brief in the Court of Appeals. The Receiver's awareness of the Petitioners' status as general creditors has never been disputed in this case.

[4] The following are examples of the Receiver's responses to the Petitioners' inquiries:

"We are in receipt of your correspondence with regards to the above-referenced. [Centuras] * * * We are in the process of reviewing the files that were seized by the State Banking Department on December 7, 1987 as granted by the Superior Court .... As soon as we have arrived at a decision we will contact you." (Letter of 4/1/88.)

"All injured Investors, Borrowers, and General Creditor's [sic] will be discussed with the Court at the close of the Receivership." (Letter of 6/28/88.)

"We appreciate your patience and understanding governing this matter and can assure you that as soon as the data has been reviewed and analyzed in quest of a solution, we will contact you." (Letter of 2/29/88.)

On October 26, 1992, fully 4 years 10 months after its appointment, the Receiver filed its "First Interim Accounting and Report" covering December 7, 1987 to April 30, 1991. This is the first indication of the Receiver attempting to comply with the duties set forth in Article 7 of the Appointing Order. The Receiver did not provide the Petitioners any notice that the Accounting had been filed in court, but nevertheless asked the trial court for its approval. The trial court approved the accounting without knowledge of the Petitioners.[5] Shortly after its approval

---

"Since you only have a general company note that is unsecured, our ability to pay you, as requested at this time is impossible and the possibility that we will ever be able to pay this note is highly unlikely. * * * [Y]ou [will] be placed in our General Creditor's file and....all injured Investors, Borrowers and General Creditors will be discussed with the Court at the close of the Receivership ....Meanwhile, the Receiver, his counsel and the Attorney General are presently investigating an order of priority in order to make a determination as to which claimants may be entitled to preference when a disbursement occurs." [Emphasis added.] (Letter of 12/4/90.)

[5] Notice of this and other transactions was provided only to parties who appeared on the "master mailing list" by virtue of having made a formal appearance in the proceedings. The Receiver never informed the Petitioners that they had to request to be on the mailing list in order to be kept informed of proposed actions that might affect their interests. Established law is that a creditor's interests are protected by virtue of filing a claim, and that in the ordinary course, no formal appearance

the Petitioners found out about the accounting. They appeared through counsel and got permission to file a response.

Inspection of the First Interim Accounting revealed to Petitioners for the first time that the Receiver had already released valuable assets of the Centuras estate to other claimants without properly determining priorities, and without notice to the Petitioners. These assets consisted of promissory notes which were found in Centuras' possession at the inception of the receivership. The claimants had contended that based on contracts between them and Centuras calling for delivery of the notes, they had perfected security interests, even though there had in fact been no delivery. The Receiver agreed.[6] The Receiver and the

---

is necessary. See, e.g., Clark, A Treatise on the Law of Receivers, 3d ed., at various sections, including the following: §532(a)(While strangers to a receivership must formally appear, receivership creditors who have already filed claims are deemed "quasi-parties", and no formal appearance by them is necessary.); §541(a)("By presenting the claim to the receiver a creditor becomes a quasi-party to the suit. * * * Under the conditions as outlined above a general creditor will not ordinarily be allowed to intervene in the receivership case when as appears on the face of his petition, his rights are fully protected by filing his claims.")

[6] The Receiver's determination that the claimants were secured parties was incorrect. Regardless of any unperformed contract between Centuras and the claimants, perfection of a security interest in a promissory note requires actual possession of the note, U.C.C. 9-304, or constructive

claimants entered into stipulations, and orders for the Receiver to release the notes were submitted to the trial court for signature, all without any notice to Petitioners.[7]

The release of estate assets to parties who did not have perfected security interests therein caused substantial damage to Petitioners' position as unsecured creditors of the Centuras Estate.[8] For this reason, on October 25, 1993 the Petitioners filed an objection to the Receiver's request to approve the First Interim Accounting.[9]

---

possession through a third party, U.C.C. 9-305. The requirement of delivery is designed to avoid the same personal property being used as security for multiple debts, and to avoid the granting of improper preferences through sham transactions fabricated after an insolvency occurs.

[7] The stipulations and orders were sent only to parties on the master mailing list. The trial court evidently was unaware that the Receiver failed to provide notice to all interested parties.

[8] The promissory notes should have been treated as estate assets in which no security interest was perfected. The parties to whom the Receiver released the notes should have been treated as general creditors only, and received their pro rata share of said assets on an equal priority with the Petitioners.

[9] The Petitioners also objected that the accounting was inaccurate, that the Receiver concealed evidence of its mismanagement, and asked for permission to examine the Receiver's books and records and to interview the Receiver's accountant.

In that objection the Petitioners further argued that it was improper for them to be deprived of their property rights without notice, and that approval of the transactions shown in the accounting without a hearing and right to object was a violation of due process:

> Further...the general unsecured creditors of the Estate remaining had a right to be noticed of the improper releases done by the Receiver and were therefore deprived of their rights in the property of the Receivership Estate. [Citation omitted.]

Id., at 107. and:

> It is a basic right of due process that such interested parties [i.e., Petitioners] have a right to object and to have a hearing before the accounting is confirmed...

Id., at 114.

The Receiver did not respond directly to the allegations contained in Petitioners' objection to the accounting. Rather, the Receiver filed a motion to dismiss the objections, arguing, inter alia, that regardless of what errors or omissions it committed, the Receiver was protected by absolute "derivative judicial immunity", that the Petitioners had constructive notice of the questioned transactions by virtue of

the stipulations being filed in court, and that given such notice, the Petitioners were guilty of laches for not objecting sooner to the questioned transactions.[10] Petitioners opposed the Receiver's motion to dismiss, again asserting due process rights: "The Receiver did not investigate or advise the Court [as required in the Appointing Order], and, as a result, his negligence now deprives the Petitioners of due process and loss of their property."[11]

The trial court agreed with the Receiver, finding that the Petitioners were guilty of laches, and ruling that the Receiver was absolutely immune. The trial court also ruled that the Petitioners' objection was brought in bad faith, since it found that they could not have reasonably believed that the Receiver was not entitled to immunity. On this basis sanctions of $20,015.28 were ordered against the

---

[10] At this juncture it is important to note the procedural posture of the case. The Receiver's motion to dismiss the Petitioners' objections assumes the truth of the objections and states that no actionable claim for relief exists. See, annotations under Rule 12(b), Ariz.Rules Civ. Proc.; Cf., analogous Federal Rule 12(b).

[11] Objecting Petitioners' Response to Receiver's Motion to Dismiss, filed 11/30/93, at page 3.

Petitioners and their trial counsel.[12]

2. Proceedings Before the Arizona Court of Appeals.

Upon appeal to the Arizona Court of Appeals, the Petitioners pointed out that an order in a receivership purporting to determine priorities and other claims, made without notice to the affected creditors is invalid. As argued in Petitioners' Opening Brief at pg. 34, this point was given very thorough analysis, particularly from a due process standpoint, in Koester v. Citizens' Publishing Co., 151 S.E. 452 (S.C.1930).[13]

---

[12] Another basis for the sanctions concerned the "unclean hands" of other parties who initially appeared together with the Petitioners, but who have since abandoned the case. The court did not distinguish between these parties and issued the sanctions jointly and severally.

[13] See also, Union Trust Co. v. Illinois M. Ry. Co., 117 U.S.434,460, 6 S.Ct. 809,823 (18__):

> [Court supervising receivership] cannot, without giving such parties their day in court, deprive them of their priority of lien. When such prior lienholders are brought before the court, they become entitled, upon the plainest principles of justice and equity, to contest the necessity, validity, effect, and amount of all such [previously issued] certificates as fully as if such questions were then for the first time presented for determination.

In Lambert v. National Hog Co., 106 A. 541 (Pa.1919) the court stated:

> [N]o such settlement and adjustment [of the receiver's accounting] could properly be made without a consideration of that account itself, and a hearing of the objections of interested parties; and no such hearing could be efficacious, under the due process of law provisions of the constitutions of the United States and of this state, without giving such interested parties an opportunity to produce their evidence touching the disputed items in the account. Both classes of objectors here are interested parties, yet neither was given an opportunity to produce evidence. That was clear error.

In Progress Press Brick & Machine Co. v. Sprague, 65 S.W.2d 154,159 (1933), the Missouri Court of Appeals addressed the question of notice and the distribution of assets thus:

> It is to be observed that the giving of notice to creditors is an essential prerequisite to the payment of claims, it being elemental that one whose rights will be affected by a proceeding in court should be notified in order that he may appear and protect his interests. It follows, therefore, that any payments made are subject to the rights of the parties in interest to whom no notice had been given, even in the case of parties to the action in which the receiver was appointed and other parties of record who appeared to be interested in the fund. [Citations omitted, emphasis added.]

See also, St. Joseph Loan & Trust Co. v. Studebaker Corp., 66 F.2d 151,159 (1933)(No error in denying receiver's petition to allow payment of claim which was submitted to court without knowledge or consent of general creditors.); Mauer v. George B. Spearin, Inc., 187 A. 47 (N.J.App.1936) (Notice and

Responding to the trial court's finding of immunity, Petitioners sought to debunk the false notion that receivers are in all circumstances entitled to immunity from liability for negligent or wrongful conduct. Traditionally, such liability has been enforced.[14]

Further, case law has consistently held that the fact that a receiver obtained a court order approving priorities and the release of assets will not protect the receiver from liability for negligence where

---

opportunity to be heard must be given to creditors before approval of receiver's request for approval of accounting and payment of its administrative costs.); Fugazy Travel Bureau Inc. v. State, 188 So.2d 842 (Fla.App.1966)(Order approving sale of receivership assets vacated where made without notice to interested parties.); Mortimer v. Pacific States S & L Co., 145 P.2d 733,738 (Nev.1944)(Order allowing compensation to receiver's attorney made without notice to interested parties, nor providing opportunity to be heard, was invalid.); Pemberton Lumber & M. Ind. v. Wm. R. Ridgeway Const. Co., 118 A.2d 873,875 (N.J.App.1955); Metropolitan Trust Co. v. Lake Cities Elect. Ry. Co., 100 F.2d 879,900 (1900); Modart Inc. v. Penrose Indust. Corp., 293 F.Supp. 1116,1120 (1967).

[14] See, e.g., United States ex rel. Willoughby v. Howard, 302 U.S. 445,450, 58 S.Ct. 309,312 (1937)("By the common law, every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate..."); Jackson v. Smith, 254 U.S. 586, 41 S.Ct. 200 (1921)(Receiver liable for personal profits obtained from sale of estate property.); Koontz v. Northern Bank, 83 U.S. 196 (1872) (If Receiver misleads court or omits duties, he is liable for injuries caused.)

the order itself was obtained without notice to the creditors of the estate whose interests were affected.[15]

---

[15] See, e.g., People v. Family Fund Soc., 52 N.Y.S. 867,869-70 (1898) which analyzed what is wrong with such an immunity claim:

> The court below, however, denied the motion [to...] on the ground that, whatever the original rights of the respective claimants, the receiver could not be compelled to restore this money, for the reason that he had paid it out under an order of the court. This general rule, however, does not apply here....Instead of remaining neutral, [the receiver] espoused the cause of the death claimants against the persistent members, petitioned the court for leave to pay the former, and sedulously avoided giving the latter notice of his application, or an opportunity to be heard thereon. An order thus obtained and acted upon cannot be a protection to him. This case differs essentially from Willis v. Sharp, 124 N.Y. 406, 26 N.E. 974, and other cases where the receiver has been held protected. See People v. Randall, 73 N.Y. 416, Swart v. Trust Co. (Sup.) 7 N.Y. Supp.558. In these cases the receiver did not take the initiative, but merely obeyed an order duly procured by another...The absolute rule contended for by the respondent, if applied in a case like the present, would remit the appellants solely to recourse to the payee. If the latter should prove irresponsible, they would be wholly remediless, and would thus be deprived of their money, without ever having had an opportunity to establish their right to it. It is well settled that a party is not protected simply because he pays

> under an order of the court. Schrauth v. Bank, 86 N.Y. 390. He cannot thus deprive the true owner of his rights when he has notice of them. The rule exempting a receiver or other depository of money from liability for a payment made under a court order or decree has never been applied as against the real party in interest, when such party was not bound by the order or decree, and the payor had notice of his rights. * * * Without at all questioning or impairing the general rule, we think it clear that as against these appellants the receiver here is not protected by the order which he obtained, so far as they were concerned, ex parte, and in violation of their rights. [Emphasis added.]

In Pehlan v. Middle State Oil Corp., 154 F.2d at 978,998 (1946) the court stated:

> Appellants do not ask (nor do they need to ask) that the decrees ordering or confirming the sale be set aside. They are not attacking the reorganization as such. They are seeking to hold Glass, as receiver, liable on the alleged ground that he misbehaved to the injury of his cestuis. It will not do to say that Glass merely obeyed what the court decreed, if on a full hearing it turns out that improperly he helped to bring about those decrees. [Emphasis added.]

In Naslund v.Moon Motor Car Co., 134 S.W.2d 102,111 (Mo.1939), the court responded thus to the receiver's petition for approval of an accounting:

> There is no support for approval of the other items. An ex parte order of the court will not and should not suffice, because in such case, as was the case here, there is no opportunity afforded to determine the status of claims as to

As for the trial court's finding of laches, Petitioners argued in their brief that laches requires the waiver of a known right.[16] Knowledge via constructive notice cannot be based merely upon filing documents in court, since there is an affirmative duty to inform other parties of legal actions

---

priority, etc. [Citation omitted, emphasis in original.]

In Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538, 542 (9th Cir.1987) claim was made against the FDIC, acting in the capacity of a state-appointed receiver, for improper preferential transfers made without notice. In a familiar argument, the receiver claimed that it was shielded by the fact that there were trial court orders approving the same. Responding, the court stated:

> The FDIC challenges this suit as being an impermissible collateral attack upon the Superior court order that approved the purchase and assumption agreement. However, court approval of the assumption agreement does not dispose of the issues here. Nowhere in the order did the court authorize the receiver arbitrarily to exclude liabilities or to act in contravention of California state law [concerning creditor priorities]. [Emphasis added.]

See also, First Empire Bank v. F.D.I.C., 572 F.2d 1361 (9th Cir.1978).

[16] Flynn v. Rogers, 172 Ariz. 62,66, 834 P.2d 148,152 (1992).

that may affect their interests.[17] Thus, a receiver may not claim the defense of laches where he neglected to provide notice of his actions to parties interested in the estate.[18]

The Court of Appeals' Decision (Appendix A) affirmed the trial court's judgment in favor of the Receiver, the key elements of its holding being:

(1) That a Receiver is entitled to absolute quasi-judicial immunity, and therefore may under no circumstances be held liable for actions taken in the course of the receivership.

(2) That as a factual matter, the Appellants are to be charged with notice of

---

[17] See, e.g. Sutton v. Zewadski, 70 So. 433, 434-5 (Fla.1915). Compare, Mountain States Tel. & Tel. Co. v. Kelton, 79 Ariz. 126,130, 285 P.2d 168,___ (1955)(The recording of a deed is constructive notice only to those who are bound to search for it.)

[18] Pehlan v. Middle State Oil Corp., 154 F.2d 991 (1946) states:

> A receiver who has strayed from his duty to the injury of anyone interested in the estate can and should be surcharged when he asks for approval of his final accounting. * * * A person interested in the estate who asks for such surcharging is not barred because of laches if he acts with reasonable promptness after he discovers the facts showing such misconduct by the receiver.

the Receiver's transactions releasing assets to unperfected parties.

Thereafter, Petitioners filed a motion for reconsideration with the Court of Appeals, reiterating their claim that granting the Receiver immunity constituted a violation of due process.[19] Petitioners analyzed the authorities and reasoning in the decision, and explained why the court's

---

[19] On page 8 of the motion Petitioners stated: "On page 5 of the Opinion the court cites several cases which purports hold that the Receiver is absolutely immune. Appellants have examined these authorities and have found them readily distinguishable from the circumstances of the present case. The court is asked to observe that these are all Federal cases, where a state-court appointed receiver was being sued. In all these cases the Federal court found that whatever actions by the receiver were being complained of, the complainant had notice and the opportunity to object to such actions in the state court. Basically, then, all these cases involved collateral attacks upon the state court judgments. No civil rights violations were stated where due process had already been afforded in the state courts....The present case is distinguished from the foregoing because the Appellants (Large Group) did not have timely notice and an opportunity to object to the Receiver's actions. Where such fundamental due process is lacking, and particularly where the deficiency is attributable to the actions of the receiver itself, courts are unanimous that the mere existence of a court order will not protect the receiver."

conclusion of immunity was erroneous.[20] Further on the issue of immunity, Petitioners directed the court's attention to the case of Adams v. State of Arizona, 185 Ariz 440, 916 P.2d 1156 (App. 1996), which had recently been decided by a different division of the Arizona Court of Appeals.[21] Adams examined derivative judicial immunity as it has traditionally been granted to individuals working under the direction of a court. As discussed below, Adams offered an analytic framework for determining when such immunity should apply, said framework being consistent with due process principles. Finally, Petitioners argued that the court's finding that they had actual notice of the questioned transactions was factually and legally baseless.

The Court of Appeals denied the motion for reconsideration. Thereafter, Petitioners filed a Petition for Review to the Arizona Supreme Court. The arguments in that petition were essentially similar to those already made in the motion for reconsideration, including the emphasis upon how the holding that the Receiver was absolutely immune violated Petitioners' due

---

[20] These and other relevant issues will be discussed in the following section "Reasons Why Petition for Writ of Certiorari Should Be Granted".

[21] The Adams case had been decided after the completion of briefing in the present matter. The case was brought to the court's attention via a supplemental citation, and during oral argument.

process rights. The Arizona Supreme Court declined to accept review of the case.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

This petition should be granted to correct the injustice that has befallen the Petitioners, and to publicly reassert, for the benefit of the courts of Arizona and this nation, that Constitutional due process principles apply to receiverships just as they do to other judicial proceedings involving individuals' property rights.[22]

It is a fundamental tenet of this country's due process jurisprudence that a party shall be given fair notice and an opportunity to be heard before their fundamental rights in life, liberty, or property may be impaired.[23] In the present case, however, the courts of the State of Arizona have failed to protect the property rights of the Petitioners. In violation of due process, they have permitted the Petitioners' interests as general creditors of the Centuras estate to be lost, as assets were handed away to the wrong parties

---

[22] Since the advent of the Bankruptcy Code, the use of receiverships has fallen off dramatically, and many long established principles have been forgotten.

[23] Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956); Lambert v. California, 355 U.S. 225, 355 S.Ct. 240 (1957).

without any notice or opportunity for the Petitioners to object.

1. Granting The Receiver Immunity From Liability For Negligent Acts It Took Without Notice To The Petitioners Violates Their Constitutional Protection Against Deprivation Of Property Without Due Process Of Law.

The Arizona Court of Appeals' ruling that receivers are in all instances entitled to absolute immunity is legally incorrect and contrary to due process principles. The court first cites a group of Arizona cases: Acevedo v. Pima County Adult Probation Dept. 142 Ariz. 319, 690 P.2d 38 (1984); Lavit v. Superior Court, 173 Ariz. 96, 839 P.2d 1141 (App.1984); Yamoto v.Santa Cruz County Bd. of Supervisors, 124 Ariz. 538, 606 P.2d 28 (App.1979). These cases discuss the quasi-judicial immunity as it has traditionally been afforded to probation officers, court-appointed psychiatrists, and court clerks, respectively. The cases, however, do not support a finding that the present Receiver is absolutely immune, because unlike these, the Receiver's acts were committed without notice to the Petitioners and did not provide Petitioners the minimum judicial safeguards that are required by due process.

Adams v. State of Arizona, 185 Ariz. 440, 916 P.2d 1156 (App.1996) provides a carefully analyzed approach to determining whether judicial immunity should attach to the acts of an individual working under or at the direction of a court. The Adams

opinion is significant because it reconciles quasi-judicial immunity with the due process requirements of notice and opportunity to be heard. Among other reasons, counsel asks this Court to consider accepting this case for review because it presents a valuable opportunity to issue an opinion articulating such principles in a national forum.

The Adams court first states that there is no immunity where the actions of a court officer were not subject to the traditional checks normally operating upon judicial decision-makers. 185 Ariz. at 446, 916 P.2d at 1162. This is pertinent when one asks why immunity ought not be conferred on the Receiver where was it was conferred on probation officers, court-appointed psychiatrists, court clerks, etc. The answer is this: in each of the foregoing cases the actions of the individual in question was subject to the traditional safeguards normally found in the legal system.[24]

---

[24] For example, a probation officer may arrest a probationer and seek to revoke the probation; an appointed psychiatrist will investigate, write a report and testify; a clerk will carry out the order of the court to release a cash bond that had been deposited there. In every one of these cases, any party aggrieved by the actions taken or to be taken may offer their own version of the pertinent facts and law to the trial court, may cross-examine the individual if they are a witness, may object to the court's ruling directly, and ultimately may have the ruling and its affect upon them reviewed by appeal.

Such customary judicial safeguards stand in sharp contrast to those afforded Petitioners in the present case. The Receiver determined who had perfected security interests, who was entitled to priority, and to whom assets should be released, all without notice to the Petitioners. It is indisputable that these actions dramatically affected Petitioners' property interests by depriving them of their pro-rata share in the notes. Yet, the Arizona courts have said that Petitioners have no recourse. The Receiver is thus subject to none of the traditional due process judicial safeguards to which all other court officers must conform. This effectively grants the Receiver even greater immunity than that of the trial court, since a trial court's decisions are at least subject to appeal. In sum, according to the Court of Appeals, the Receiver is beyond the reach of the law, this a clear conflict with due process principles.[25]

The second principle articulated in Adams concerns the extent to which an individual wields control, as opposed to

---

[25] Such an extreme form of immunity is hardly necessary. To protect itself, all the Receiver had to do was proceed in an orderly fashion, as Article 7 of the Appointing Order directed -- i.e., marshall the assets, present a plan showing priorities and proposed distribution, notice all affected parties, and after hearing, carry out the court's order. In such case there is no dispute that the Receiver would be protected by a valid court order obtained in accordance with due process.

merely carrying out a court's order. This factor weighs against immunity because the Receiver completely controlled the transactions for the release of the promissory notes. The Receiver negotiated with the parties claiming interest in the notes; the Receiver and those parties drafted the pertinent stipulations; the Receiver presented the stipulations and orders to the trial court for signature; and the Receiver decided who should and who shouldn't receive timely notice thereof. By exercising such control the Receiver was not merely carrying out orders of the court, but rather was active in procuring such orders. In such circumstance the Adams court held that there is no immunity where the officer:

> "essentially...controlled the information supplied to the... court, as revealed by their investigations, and the court relied upon that information in making its... decisions. We cannot say that there are sufficient accountability safeguards inherent to or routinely used in this process to warrant the granting of absolute immunity in this context."

185 Ariz. at 446, 916 P.2d at 1162. It should be noted that this Court has itself withdrawn the protection of immunity where the information provided to a court was

intentionally or negligently deficient.[26]

The second line of cases the Court of Appeals relied on are four Federal decisions[27] it cites for the proposition that "receivers who faithfully and carefully carry out the orders of the appointing court are entitled to absolute immunity." However, these cases are readily distinguishable from the present circumstance, and do not mandate the Receiver be accorded absolute immunity for the following reasons:

(a) None of those cases extended immunity to a receiver for actions taken without due notice to affected parties, whether accompanied by a court order or not.

(b) All involved collateral attacks on state court actions, where the state court had provided notice and an opportunity to litigate the issues in question. Thus, no constitutional violations were stated where

---

[26] See, e.g., Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606 (1993)(Denying absolute immunity to prosecutors who allegedly fabricated evidence.); Malley v. Briggs, ___ U.S.___, 106 S.Ct 1092 (1986) (Denying immunity to officer where search warrant was procured upon improper grounds.)

[27] New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298 (9th Cir.1989); Property Management & Invs., Inc. v. Lewis, 752 F.2d 599 (11th Cir.1985); Kurtz v. T & W Inv. Co., 588 F.2d 801 (10th Cir.1978); Kermit Constr. Corp v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1 (1st Cir.1976).

due process had already been afforded. In the present case, in contrast, neither the trial court nor the Court of Appeals have given the Petitioners an opportunity to litigate the substance of their claims against the Receiver.

The fact of the matter is that the Arizona courts have failed to demonstrate any satisfactory legal justification to explain how Petitioners could be deprived of their property rights without notice and an opportunity to be heard. As has been done in this petition, the Petitioners directed the Arizona courts' attention to ample uncontradicted authority holding that an accounting should not be approved and a receiver not discharged from liability where erroneous dispositions of property were done without notice to the parties affected, and further showing that immunity will not be conferred by a court order obtained in violation of due process.[28]

2. The Arizona Court Of Appeals' Holding That The Petitioners Are To Be Charged With Notice Of The Receivers' Improper Transactions Is Without Basis In Fact Or Law And Violates Petitioners' Due Process Rights.

---

[28] It is, frankly, disconcerting that despite this vast weight of authority, the Court of Appeals chose to simply ignore it, rather than acknowledging the conflicting authority, and either distinguishing, reconciling or explaining their rejection of it, as the integrity of their decision should demand.

The Court of Appeals' finding that the Petitioners are charged with notice of the Receiver's transactions granting improper preferences also entails due process issues, the character and adequacy of any purported notice being a federal question.[29]

In its decision the court lists four factual bases for its finding of notice:

(1) Each Petitioner received the original "Appointing Order". [Appendix B.]

(2) Each Petitioner received Receiver's "Petition 3". [Appendix B.]

(3) Several Petitioners received letters from the Receiver stating that as unsecured creditors they were unlikely to receive any receivership assets. [See, excerpts of Receiver's letters, supra., fn. 4.]

(4) Several of the appellants themselves had previously petitioned to have property released to them by the

---

[29] See, Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 (1962)(Posting signs inadequate); Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956)(Service of property owner by publication inadequate where actual address was known.); Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724 (1956) (Service upon known incompetent inadequate.); Honeyman v. Hanan, 302 U.S. 375, 58 S.Ct. 273 (1938) (States may choose their own methods of determining legal obligations, so long as reasonable notice and fair opportunity to be heard is provided.)

receiver.

The evident intent of these findings was to bolster the trial court's laches ruling, and to rebut any claim of lack of due process in the receivership proceedings. However, the court was factually and legally incorrect in finding that notice was provided to Petitioners as purportedly set forth above.

First, nowhere does the Appointing Order [Appendix B] even remotely indicate that the Receiver was authorized to determine security interests, assign priorities, and release assets without notice to the general creditors. The portions of the Order quoted in the court's opinion simply do not grant any such powers to the Receiver.[30]

The second purported basis for notice to the Petitioners, Receiver's Petition No. 3 [Appendix C], also does not authorize the Receiver to engage in the questioned transactions -- determining whether certain claimants' interests in the promissory notes were perfected and stipulating to release the same -- without notice to the general creditors. The Court of Appeals' analysis of Petition 3 discloses a fundamental error, as that document grants the Receiver powers

---

[30] In fact, the last paragraphs of the Order the Court of Appeals quoted have nothing whatsoever to do with the Receiver's powers, but rather address what actions interested parties may not take against the receivership estate.

only with respect to **real property**, and not personal property, of which promissory notes are a specie. The distinction between real and personal property is fundamental, and cannot be ignored. Thus, it cannot fairly be said that Receiver's "Petition 3" puts the general creditors on notice that the Receiver could release promissory notes without informing them and providing an opportunity to contest the same.

The third basis for the court's finding that Petitioners were on notice of the improperly released promissory notes is the fact that in response to their inquiries, the Receiver's letters had indicated that there may not be assets available to pay unsecured creditors' claims. With all due respect, this contention strains common sense. There is no basis to charge the unsecured creditors with knowledge of the assets and the various interests alleged in the estate until the Receiver made its report as directed by the Appointing Order.[31] The Receiver's letters plainly indicated the general creditors' interests would be addressed at such time as priorities are established in anticipation of disbursements being made. Not until the Petitioners got to review the Receiver's First Interim Accounting did they learn that they had been misled -- that all along the Receiver had been handing out assets in a

---

[31] Which the Receiver did not do until 4 years 10 months after its appointment, this long after the disputed transactions had occurred.

haphazard fashion to parties who were not properly secured. Frankly, it is absurd to tell Petitioners that they should have been more suspicious and mistrusting of the Receiver -- a court appointed trustee whose very duty it was to protect them.

The final basis upon which the court found that there was notice of the disputed transactions is the fact that certain parties other than the Petitioners (the "unclean hands" parties), had previously asked the Receiver to release assets to them that, in retrospect, they too did not have perfected security interests therein. These parties had joined with Petitioners in the original appeal for the sole purpose of contesting the award of sanctions. Merely joining with Petitioners in the appeal is clearly no basis to impute any awareness of the disputed transactions to Petitioners, and it was unreasonable for the Court of Appeals to have failed to keep the distinction between the parties clear in its mind.

Therefore, on the basis of the foregoing the Petitioners submit that they should not have been charged with notice, actual or constructive, of the Receiver's improper releasing of promissory notes to unperfected parties.

Conclusion

Granting immunity to the Receiver in the present case results in the Petitioners being deprived of their property without

notice or an opportunity to be heard. This is a violation of their due process rights under the 14th Amendment of the United States Costitution. For this reason it is requested that a writ of certiorari issue to review the decision of the Arizona Court of Appeals.

Respectfully submitted this 18th day of March, 1997.

Brenda Jeane Lee
655 North Alvernon, Suite 112
Tucson, Arizona 85711
(520) 322-5575

Attorney for Petitioners

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel. RICHARD C. HOUSEWORTH, Superintendent of Banks, Plaintiff - Appellee, v. L. ALSTON; [Etc.] Objecting Petitioners - Appellants.	1 CA-CV 94-0379 DEPARTMENT E MEMORANDUM DECISION (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court of Maricopa County

Cause No. CV 87-32891

The Honorable Sherry H. Hutt, Judge

AFFIRMED

Guttilla & Murphy

by Victoria Gruver
and Nicholas C. Guttilla
Phoenix
Attorneys for Appellee

Ethan Steele
Tucson
Attorney for Appellants

VOSS, Judge

This appeal arises out of the receivership of Centuras Investment Company, Inc. (Centuras), a mortgage bank licensed by the state. On December 7, 1987, pursuant to petition by the State Banking Department, Centuras was placed into receivership. Mary C. Short, Superintendent of Banks, was appointed receiver. The receiver sent notices to all investors and borrowers of Centuras that the company was in receivership and attached a copy of the receivership order. Additionally, each investor and borrower received a copy of the receiver's petition for the authority to dispose of certain receivership property and detailing the procedure the receiver would undergo in releasing this property.

Throughout the receivership, numerous investors and creditors of Centuras, including several appellants, took action to have their notes and security released by the receiver. In a number of these instances, the receiver approved such action, received a court order approving release of the property, and released the

property. Additionally, the receiver compromised several claims held by the receivership estate.

At numerous times during the receivership, several appellants wrote letters to or telephoned the receiver inquiring about the status of their claims. The receiver responded to at least one such inquiry by reminding the creditor that "[s]ince you only have a general company note that is unsecured, our ability to pay you, as requested at this time, is impossible and the possibility that we will ever be able to pay this note off is highly unlikely." The receiver later stated, "[i]t is quite possible that administrative expenses will exceed the amount of the receivership assets."

On October 26, 1992, the receiver filed a petition for approval of its first interim accounting and report for the period between December 7, 1987, and April 30, 1991. Appellants filed an objection to the petition for approval. In their objection, appellants contended the receiver improperly released receivership property consisting of promissory notes to creditors with unperfected security interests. Appellants contended that releasing these notes created improper preferences and improperly depleted Centuras' asset account. Appellants further contended the receiver failed to collect rents due on receivership property and lost real property for failure to pay real estate taxes.

On April 12, 1993, appellants filed a motion to permit discovery. Appellants requested "access to the Receiver's files pertaining to each investor for whom [appellants] provide a signed consent," to "interview the auditors in this matter, Price Waterhouse," and to have Michael Figueroa "attend the review of such files and the meeting with the auditors." The trial court denied appellants' motion to permit discovery on May 10, 1993.

The trial court awarded joint and several sanctions against attorney Thomas Sylvester and appellants. This award has been satisfied by Sylvester, who does not join this appeal.

The trial court granted the receiver's motion to dismiss the objection because the receiver is immune, appellants' claims were barred by laches, and because several appellants had unclean hands. Appellants filed a timely notice of appeal.

JUDICIAL IMMUNITY

Judges and court officials are immune for actions taken in their official capacities. Judicial immunity applies even if the act complained of was "in error, done maliciously or in excess of his authority." *Yamamoto v. Santa Cruz County Bd. of Supervisors*, 124 Ariz. 538, 540, 606 P.2d 28, 30 (App. 1979). The immunity is inapplicable only where the court acts in the clear absence of jurisdiction. *Id.*

Contrary to appellants' contentions, the actions complained of in this case were within the jurisdiction of the trial court. Arizona Revised Statutes Annotated section 12-1241 authorizes trial courts to appoint receivers to protect and preserve property or the rights of parties to the property. Further, Rule 66(c), Arizona Rules of Civil Procedure, provides, "[t]he receiver shall take and keep possession of the property, receive rents, collect debts and perform such other duties respecting the property as authorized by the court." Together these provisions confer jurisdiction upon the trial court to appoint a receiver and supervise the receiver in the preservation and distribution of the assets of the receivership estate.

Judicial immunity also applies to court officers or others appointed to assist the judiciary carry out its functions. *Kurtz v. T & W Inv. Co.*, 588 F.2d 801, 802 (10th Cir. 1978); *Acevedo v. Pima County Adult Probation Dep't*, 142 Ariz. 319, 321, 690 P.2d 38, 40 (1984); *Lavit v. Superior Ct.*, 173 Ariz. 96, 99, 839 P.2d 1141, 1144 (App. 1992). Receivers are ministerial officers of the court appointing them and may act only subject to court order. *Stowell v. Arizona Sav. & Loan Assoc.*, 93 Ariz. 310, 311, 380 P.2d 606, 607 (1963); *Midway Lumber, Inc. v. Redman* 4 Ariz. App. 471, 472, 421 P.2d 904, 905 (App. 1967). As court officers, receivers who faithfully and carefully carry out the orders of the appointing court are entitled to absolute immunity. *New Alaska Dev. Corp. v.*

Guetschow, 869 F.2d 1298, 1303 (9th Cir. 1989); *Property Management & Invs., Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985); *Kurtz*, 588 F.2d at 802; *Kermit Constr. Corp v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976). Without this broad immunity, receivers would be "lightning rod[s] for harassing litigation aimed at judicial orders." *Id.*

In the present case, the trial court's appointing order directed the receiver to:

> 6. Subject to approval by this Court, institute, prosecute, defend, compromise, intervene in, seek stays in, or become a party to, such suits, actions or proceedings at law or equity as may in the receiver's opinion be necessary for the collection , recovery, protection, maintenance or preservation of the receivership properties.

The order further states that:

> except by leave of this court, during the pendency of the receivership ordered herein . . . all customers, principals, investors, creditors, . . . and other persons seeking to establish or enforce any claim, right or interest . . . are hereby stayed from:
>
> . . .

> 3. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of, any receivership properties, or attempting to foreclose, forfeit, alter, or terminate any interests of [Centuras], in any property . . .

Order Appointing Receiver at 4-5. Together these sections clearly illustrate that the trial court granted the receiver wide-ranging authority to compromise claims against the receivership estate, and, with leave of the court, to relinquish control of specific receivership property.

Soon after the receiver was appointed it filed a petition asking the trial court for authority to abandon interests in property and to assist secured parties to foreclose on property that the receiver determined had no net equity. The petition described the process the receiver would utilize in executing the authority and who would receive notice of each transaction. The petition was sent to all Centuras' investors and borrowers, including appellants. At least on Centuras' creditor responded to the petition. Appellants neither responded nor objected to the petition.

The trial court granted the petition. Under the order, the receiver could abandon any interest in property in which the

receiver determined Centuras had no net equity. The order required that the receiver provide notice to the court, investors of Centuras secured by such property, and to specific borrowers involved in the property. The receiver followed this procedure in releasing Centuras' interest in several pieces of property. Before each transaction, the receiver petitioned the court to lift the injunction covering the object property. Only upon receipt of a court order did the receiver actually release the property.

The trial court made a factual finding that the receiver acted pursuant to court orders. We are bound by the trial court's finding of fact unless it is clearly erroneous. *Schnepp v. State ex rel Dep't of Economic Sec.*, 183 Ariz. 24, 27, 899 P.2d 185, 188 (App. 1995).

The release of property to First American Savings (FAS) is an example of a release of property to which appellants objected. Centuras had borrowed money from FAS secured by Centuras' beneficial interest on a trust containing mortgages and deeds of trust on various pieces of property. Centuras and FAS filed a stipulation and proposed order to lift the permanent injunction to allow FAS to proceed with a trustee's sale of two pieces of property. The stipulation and proposed order stated the receiver's finding that Centuras had no net equity in the property and that FAS was a secured creditor. The trial court signed the order lifting the permanent injunction

and stay. Only then did the receiver release Centuras' interest in the property. The pattern of this transaction was followed in other transactions appellants complain of. The record supports the trial court's finding that the receiver acted pursuant to court order at each step of the process. The trial court, therefore, properly held that the receiver was entitled to immunity. *Kermit Const. Corp.*, 547 F.2d at 3 (receiver acting with court approval entitled to absolute immunity).

Although we do not believe the law requires receivers, in order to be entitled to immunity, to provide notice to each creditor or investor, appellants did receive sufficient notice of the receiver's actions in this case. Each appellant received the original order instituting the receivership along with a notice from the receiver. Second, each applicant received the receiver's petition "3", in which the receiver requested court authority to release property to secured creditors and which specified the procedural and notice requirements the receiver would utilize in each transaction. Third, several appellants received letters from the receiver explaining that as unsecured creditors, they were unlikely to receive any receivership assets. Finally, several appellants themselves had petitioned to have property released to them by the receiver.

DISCOVERY

Appellants contend the trial court

improperly denied appellants' request for discovery relating to the receiver's files and the employees and files of Price Waterhouse. However, because we have determined the receiver is immune for actions taken pursuant to court order, appellants' discovery request can only be relevant if targeted to discover evidence that the receiver's actions deviated from a valid court order. Appellants have not alleged that the receiver made distributions without court approval. Because the receiver is immune for all other acts, appellants have no appropriate purpose for the discovery.

SANCTIONS

The administration of receiverships is governed by the rules of equity. Ariz. R. Civ. P. 66(c)(4). The transactions which are the subject of this appeal occurred in 1988 and 1989. Appellants had notice of these types of transaction and, indeed, several appellants benefitted from precisely the type of release that they now disparage. The trial court found that appellants' actions gave rise to laches and unclean hands.

The receiver contends that the issue whether the trial court abused its discretion in awarding sanctions is moot because Sylvester has paid the sanctions and does not appeal the award. Mootness requires that opinions not be given concerning abstract questions or issues which no longer exist because of changes in

the factual circumstances. *ASH Inc. v. Mesa Unified Sch. Dist. Number 4*, 138 Ariz. 190, 191, 673 P.2d 934, 935 (App. 1983).

Although Sylvester paid the sanctions and does not appeal, the appropriateness of the sanctions is not an abstract questions. Because the award of sanctions was against the appellants and Sylvester, jointly and severally, appellants still face potential liability for the sanctions. Sylvester still has a right of contribution against the appellants. A.R.S. Section 12-2501; A.R.S. Section 12-2506(E).

The receiver cites *Forty-Four Hundred E. Broadway Co. v. 4400 E. Broadway*, 139 Ariz. 498, 679 P.2d 521 (App. 1983), to support its contention that the award of sanctions is moot. However, this case is distinguishable. In *Forty-Four Hundred E. Broadway*, the attorney's fees were not awarded jointly and severally. *Id.* at 502, 679 P.2d at 525. Although the fees were already paid, the appealing party was not in jeopardy of having to contribute to the award. Therefore, a decision by the court on the issue of fees would not have affected the parties.

We must, therefore, reach the merits of whether the trial court properly awarded sanctions against the appellants. The trial court awarded sanctions and fees of

$20,015.28 against small group appellants,[32] large group appellants,[33] and attorney Thomas P. Sylvester jointly and severally.

The sanctions against the large group appellants were based upon the trial court's determination that the immunity issue was well-settled law, appellants' objections were not in good faith and unnecessarily expanded the scope of the proceedings, and appellants were guilty of laches. The sanctions against the small group appellants were also based upon the doctrine of unclean hands. The trial court found that earlier in the receivership proceedings these appellants had requested the receiver to release property and notes to them, the same type of act they now complain of. The trial court based its award of sanctions against Sylvester on the grounds that Sylvester violated ethical rules by both representing clients petitioning to get secured property released by the receiver and later objecting to the same type of transactions.[34]

---

[32] The small group appellants include Canyon State Equity, Muriel Gray, Boniface Herrman, Steven Ketchel, and Gregg Sasse.

[33] The large group appellants consist of all appellants except the small group appellants listed in footnote 1.

[34] Sylvester did not appeal the award of sanctions against him. Therefore, we will not review the award of sanctions

We review the trial court's award of sanctions for abuse of discretion. *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection*, 177 Ariz. 316, 319, 868 P.2d 329, 332 (App. 1993).

The record supports the trial court's award of sanctions. Appellants filed lengthy objections that are clearly unsupported by existing law. Appellants waited several years after the disputed transactions before objecting. Additionally, several appellants objected to practices they themselves had engaged in during the receivership. Under these circumstances, it was within the trial court's discretion to award sanctions against appellants.

CONCLUSION

Judicial immunity protects a receiver who faithfully and carefully carries out the orders of the supervising court. In this case, each action of the receiver objected to by appellants was taken pursuant to court order. The receiver is, therefore, protected by judicial immunity.

Appellants' objections to action of the receiver were several years after the disputed actions, are the same type of acts engaged in by several appellants, and are

---

against him and any decision of this court will not effect the trial court's award of sanctions against Sylvester.

contrary to established law. Therefore, the trial court acted within its discretion by awarding sanctions against appellants and Thomas Sylvester.

Additionally, the trial court acted within its discretion in denying appellants' motion to expand discovery. The discovery was not calculated to locate evidence that would overcome the receiver's immunity.

We affirm.

APPENDIX B

3952C/7-15:FFDD87-435
ROBERT K. CORBIN
Attorney General
PATRICK M. MURPHY, Chief Counsel
Financial Fraud Division
DEANNA DELMAR, #006847
Assistant Attorney General
Attorney for Plaintiff
Department of Law Building, Room 259
Phoenix, Arizona 85007

Telephone: (602) 255-3702

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, ex rel. MARY C. SHORT, Superintendent of Banks, Plaintiff, v. CENTURAS INVESTMENT COMPANY, INC., Defendant.	)	No. CV-87-32891 ORDER APPOINTING RECEIVER AND PERMANENT INJUNCTION AND CONSENT TO SAME

The State of Arizona having filed a

complaint alleging violations of the Mortgage Banker Act A.R.S. § 6-911, et seq., and the Defendant Centuras Investment Company, Inc. ("CIC") having been duly served with a copy of the Summons and Complain; having been fully advised of its right to a hearing, trial and appeal in this matter and having waived same; having admitted the jurisdiction of the Court; having admitted that the findings of fact and conclusions of law are correct and having consented to the entry of this order and the permanent injunction; the Court enters the following findings of fact, conclusions of law and orders.

FINDINGS OF FACT

1. On December 2, 1987 Michael N. Figueroa, President of CIC met with Banking Department personnel and informed them, among other things, that:

a. CIC does not meet the minimum net worth required by A.R.S. § 6-911.02 (C)(6).

b. CIC is insolvent as defined in A.R.S. § 47-1201.

CONCLUSIONS OF LAW

1. CIC is conducting the business of a mortgage banker under Title 6, Chapter 9, Article 2, Arizona Revised Statutes, without maintaining the minimum net worth required by A.R.S. § 6-911.02 (C)(6).

2. CIC is insolvent as defined by A.R.S. § 47-1201 in violation of A.R.S. § 6-911.04(A)(1).

3. CIC has failed to comply with the requirements of Title 6, Chapter 2, Article 9, Arizona Revised Statutes in violation of A.R.S. § 6-911.04(A)(15).

ORDER

IT IS THEREFORE ORDERED appointing Mary C. Short, Superintendent of Banks, as receiver of Centuras Investment Co. ("CIC") and Francis R. Connelly as deputy receiver directing the receiver to:

1. Collect, receive and take exclusive custody, control and possession of all bank accounts, securities, business accounts, goods, chattels, causes of action, credits, monies, affects, books and records of account and other papers and property or interests owned or held by CIC or placed under the control of the receiver by court order ("receivership properties") with full power to sue for, collect, receive and take possession of such receivership properties;

2. Conserve, hold and manage all receivership properties in order to prevent loss, damage and injury to creditors and others who have done business with CIC; to obtain an accounting thereof, and to adjust and protect the interests of such creditors and other persons doing business with CIC, as approved by the Court;

3. Engage and employ current or previous employees of CIC or replacements of same to carry on the day-to-day business of CIC, as the receiver may deem necessary in the performance of her duties and responsibilities in discharging the authority conferred by this order;

4. Engage and employ attorneys, accountants, appraisers and other persons to evaluate any receivership properties, as the receiver may deem necessary in the performance of her duties and responsibilities in discharging the authority conferred by this order;

5. Make such payments and disbursements from the receivership properties and to incur such expenses as may be necessary and advisable in discharging her duties as receiver, and to present to this court from time to time an accounting of all such payments, disbursements and expenses;

6. Subject to approval by this Court, institute, prosecute, defend, compromise, intervene in, seek stays in, or become a party to, such suits, actions or proceedings at law or in equity as may in the receiver' s opinion be necessary for the collection, recovery, protection, maintenance or preservation of the receivership properties;

7. Present to this court, as soon as practicable, her written report reflecting the existence and value of all receivership properties, the extent of any liabilities,

both those claimed by others to exist and those which the receiver believes to be the legal obligations of CIC, and any further information the receiver believes may assist the court in the administration of this receivership. The receiver's report shall include a recommendation regarding the best methods for liquidation of CIC; and

8. Upon reasonable notice to the receiver, make the books and records in the possession and control of the receiver available to investigators of agencies of federal, state or local governments for their inspection and copying in a reasonable manner as deemed appropriate by the receiver.

IT IS FURTHER ORDERED that , except by leave of this court, during the pendency of the receivership ordered herein, Centuras Investment Company, Inc. ("CIC") and all customers, principals, investors, creditors, stockholders, lessors, lessees, and other persons seeking to establish or enforce any claim, right or interest against or on behalf of CIC and all others acting for or on behalf of such persons including attorneys, trustees, agents, sheriffs, constables, marshalls and other officers and their deputies and their respective attorneys, servants agents, employees, be and are hereby stayed from:

1. Commencing or prosecuting any suit or proceeding against CIC;

2. Commencing, prosecuting,

continuing or enforcing any suit or proceeding in the name or on behalf of CIC:

3. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of, any receivership properties, or attempting to foreclose, forfeit, alter or terminate any interests of CIC, in any property, whether such acts are part of a judicial proceeding or otherwise;

4. Using self-help- or executing or issuing, or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with ,, or creating or enforcing a lien upon any receivership properties;

5. Doing any act or thing whatsoever to interfere with the taking control, possession or management by the receiver appointed herein of the receivership properties or to in any way interfere with the receiver, or to harass or interfere with said receiver, or to interfere in any manner with the exclusive jurisdiction of this court over the receivership properties; and

6. Transferring servicing accounts from the receivership to anyone else for servicing except that the receiver may in her sole discrection [sic] agree to such transfers without leaf of court; and

IT IS FURTHER ORDERED that nothing in the foregoing paragraphs shall prevent any person from maintaining an action against any other persons inn connection with matters arising out of business transacted by Centuras Investment Company, Inc. ("CIC"), providing that such person does not maintain or prosecute said action against CIC or the receiver appointed pursuant to this order, in violation of this order; and provided that without leave of court, lenders do not initiate lawsuits against borrowers, including without limitation foreclosure actions, if borrowers are current in making their payments to the receiver.

IT IS FURTHER ORDERED that the receiver named herein may delegate the exercise of her duties to a deputy or deputies who shall be employees of the Arizona State Banking Department.

IT IS FURTHER ORDERED that Centuras Investment Company, Inc. ("CIC") and its officers, directors, principals, agents, servants, employees, attorneys, successors, accountants and assigns, and those persons in active concert or participation with them and each of them be and hereby are enjoined during the pendency of this action, from directly or indirectly:

1. Transacting any of CIC's business except at the direction and under the supervision of the receiver; wasting of its assets, obtaining of preferences, judgments, attachments, or other liens or making of

levy against CIC;

2. Destroying, secreting, defacing, transferring or otherwise altering or disposing of any books, records, accounts, or any other papers of any kind or nature of CIC;

3. Transferring, receiving, altering, selling, encumbering, pledging, assigning, liquidating or otherwise disposing of any assets, funds or property owned, controlled or in the possession of or in which an interest is held or claimed by CIC or the receiver appointed herein;

4. Obstructing or interfering or refusing to cooperate with the receiver appointed pursuant to this order, or her duly authorized agents, in the exercise of their lawful authority under the orders of this Court;

IT IS FURTHER ORDERED that CIC and its officers, directors, principals, agents, servants, employees, attorneys, successors, accountants and assigns and those persons in active concert or participation with them and each of them be and hereby are permanently enjoined, from directly or indirectly engaging in any acts and practices in violation of Chapter 6, Title 9, article 2, Arizona Revised Statutes.

DONE IN OPEN COURT this 7th day of December, 1987.

NORMAN D. HALL, JR
JUDGE OF THE SUPERIOR COURT

APPENDIX C

BRUCE D. ALPER
BRUCE D. ALPER, P.C.
3101 West Peoria Avenue
Suite 111
Phoenix, Arizona 85029
(602) 863-0886
Attorney for Receiver

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, ex rel. MARY C. SHORT, Superintendent of Banks, Plaintiff, vs. CENTURAS INVESTMENT COMPANY, INC. Defendant.	No. CV 87-32891 RECEIVER'S PETITION 3 FOR AUTHORITY TO SELL REAL ESTATE OR TO ABANDON PROPERTY UNDER CERTAIN CONDITIONS (Assigned to Judge Hall)

Receiver, Mary C. Short, petitions this Court for authority to engage in the following transactions:

1. To sell real estate within her control, (whether the interest of the Defendant therein is an owner of the property or as the holder of a beneficial

interest), acting through her Deputy Receiver, Francis R. Connelly, for the highest price which in the Receiver's sole discretion, is available, and to hoed the net proceeds from any such sale, pending further Order of this Court.

2. To obtain either a market analysis by a licensed real estate broker or, alternatively, a formal appraisal, in her sole discretion, with regard to each specific piece of real property which the Receiver wishes to sell.

3. To to [sic] either list a parcel with a real estate broker for purposes of sale and to pay such commission as may be reasonable and customary or, in the alternative [sic], to sell property by other reasonable means, so long as the Receiver endeavors in all cases to obtain the best price possible under the circumstances, without further Order of this Court.

4. To abandon any interest in such property, but to retain the rents, if any, previously collected thereon, pending further Order of this Court and to permit any secured party or parties to foreclose thereon, provided that she shall cooperate with any secured party attempting to sell the property prior to foreclosure and provided further that the Receiver will neither incur nor be responsible for any costs incident to such sale or foreclosure by any secured party in any instance where she determines that there is no net equity in a particular parcel of real property.

Receiver proposes that in the event she determines that there is no net equity in any particular parcel of real property either owned by the Defendant or in which it has a beneficial interest, that she file a Notice of such determination with this Court, mailing, by regular mail, a copy of such Notice to all investors of CENTURAS secured by such property as well as the specific borrowers involved in such property, and that sixty (60) days following the mailing of such Notice, this Court's Injunction contained within the Order Appointing Receiver and Permanent Injunction and Consent to Same dated December 7, 1987 shall be terminated with regard to that particular parcel of real property only.

WHEREFORE, Receiver requests that the Court grant this Petition and issue and Order declaring that:

1. The Receiver may, in her sole discretion, from time to time, acting through her Deputy Receiver, Francis R. Connelly, sell such parcels of real property within the receivership as she deems appropriate at the highest price Receiver believes is obtainable, or, sell any beneficial interest in such property as she deems appropriate, in her sole discretion.

2. That the Receiver may obtain either a market analysis from a licensed real estate broker or a formal appraisal with regard to each specific piece of property, prior to its sale.

3. That the Receiver may list property with a real estate broker for purposes of sale and may pay such commission as is usual and customary.

4. That the Receiver may sell property by means other than the retaining of a real estate broker, provided however, that the Receiver in all cases endeavors to obtain the best price reasonably obtainable under the circumstances.

5. That the terms and conditions of any sale shall be reasonable, as determined by the Receiver, in her sole discretion.

6. In the event the Receiver determines that a particular parcel of real property or a beneficial interest therein has no net equity she may abandon any claimed interest therein, retain the rents collected, if any, and permit any secured party or parties to foreclose, provided that she shall cooperate with any secured party who is attempting to sell the property prior to foreclosure and provided further that she shall not incur nor be responsible for any costs incident to such sale or foreclosure.

RESPECTFULLY SUBMITTED this _____ day of _____, 1988.

BRUCE D. ALPER, P.C.

No. 97-1

Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

L. ALSTON; ASIAPRINT, LTD.; GLORIA BARON; ROBERT BASIST; MELLISSE BRYDGES; YOLANDA DESOTO; DWAINE DIRKS; ELSIE DIRKS; MICHAEL DYMOND; CORINE FREVERT; PATRICIA KARAGEORGE; THERESA LAUBER; KAREN LAWSON; LOTTIE LAWSON; THOMAS LAWSON; JIM MARTIN; DONNA MCCONNELL; STEVEN NASON; JOHN PROVOST; EUGENE SANCHEZ; DON SHERBO; MARILYN SUMMERS; PATRICIA A. TAYLOR; EVELYN TINNEY; RICHARD WELKER and SUZANNE WOODS,

Petitioners,

vs.

STATE OF ARIZONA, *ex rel.*, RICHARD C. HOUSEWORTH, Superintendent of Banks,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Arizona

RESPONDENTS' BRIEF IN OPPOSITION

NICHOLAS C. GUTTILLA
Counsel of Record
VICTORIA GRUVER
GUTTILLA & MURPHY
A Professional Corporation
Attorneys for Respondents
4150 West Northern Avenue
Phoenix, Arizona 85051
(602) 937-2795

71625
(800) 3 APPEAL • (800) 5 APPEAL • (300) BRIEF 21
Lutz Appellate Services, inc.

28 pp

PARTIES TO THE PROCEEDING

The List of Parties in the Petition is accurate. Richard C. Houseworth remains, as of this date, the Superintendent of Banks for the State of Arizona.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. Notice	1
B. Petition 19 And The Objection	3
Reasons for Denying the Writ	6
Petitioners Argue Issues Of State Law, And Fail To Cite Any Issue Of Unsettled Federal Law	6
A. Does the Due Process Clause of the United States Constitution, Fourteenth Amendment, protect the general creditors of a state court receivership during the administration of the estate and disposition of their interests therein?	6
B. Where a state court appointed receiver erroneously determines priorities and distributes estate assets to creditors who lacked a perfected security interest therein, without first providing notice and opportunity to be heard to the other general creditors, does it violate due process to deny these injured general creditors a legal remedy?	7

Contents

Page

C. Does the fact that a receiver is under state court supervision confer upon the receiver absolute immunity against liability for negligence and breaches of fiduciary duty, where such injurious actions were taken without the notice to the injured general creditors that due process requires? 9

D. Does it comport with due process standards to confer absolute immunity upon a receiver by virtue of there being a court order approving the receiver's action, where the court order was obtained by the receiver without providing notice and an opportunity for general creditors to be heard? 10

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Academy Life Ins. Co. v. Odiorne, 165 Ariz. 188, 797 P.2d 727 (App. 1990) 8

Acevedo v. Pima County Adult Probation Dep't, 142 Ariz. 319, 690 P.2d 38 (1984) 8

Adams v. State, 185 Ariz. 440, 916 P.2d 1156 (App. 1995) 12

Contents

	Page
Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606 (1993)	10
Capitol Terrace, Inc. v. Shannon & Luchs, Inc., 564 A.2d 49 (D.C. 1989)	13
First Empire Bank v. Federal Deposit Ins. Corp., 572 F.2d 1361 (9th Cir. 1978)	11
Fremming Construction Co. v. Security Savings & Loan Ass'n, 115 Ariz. 514, 566 P.2d 315 (App. 1977)	2
Koester v. Citizens' Publishing Co., 154 S.C. 154, 151 S.E. 452 (1930)	12
Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092 (1986)	10
Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976)	7
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950)	7, 11
Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985)	7
Sawyer v. Ellis, 37 Ariz. 443, 295 P. 322 (1931)	6, 8
Stowell v. Arizona Savings & Loan Ass'n, 93 Ariz. 310, 380 P.2d 606 (1963)	12

Contents

	Page
Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538 (9th Cir. 1987)	11
United States Constitution Cited:	
Fourteenth Amendment	6
Rules Cited:	
Federal Rule of Bankruptcy Procedure 4001(a)	6
Federal Rule of Civil Procedure 23(d)(2)	7
Supreme Court Rule 9(1)	5
Supreme Court Rule 10	9
Supreme Court Rule 14(5)	5
Supreme Court Rule 34(1)(g)	5
Other Authority Cited:	
2 Ralph Ewing Clark, A Treatise on the Law and Practice of Receivers (3d ed.) § 532(a)	6
2 Ralph Ewing Clark, A Treatise on the Law and Practice of Receivers (3d ed.) § 532(c)	6

Contents

Page

APPENDIX

Appendix 1 — Findings of Fact and Conclusions of Law Dated May 18, 1994 ..... 1a

STATEMENT OF THE CASE

This case challenges the dismissal of Petitioners' claims against a court-appointed receiver based on application of the state-law defenses of absolute derivative judicial immunity and laches. The trial court found the issues so settled that sanctions were awarded, a decision which was upheld by the Court of Appeals. This matter presents no important federal issue requiring resolution by this Court. The Petition for Writ of Certiorari should be denied.

Centuras Investment Company, Inc. ("Centuras") was a mortgage banker. Centuras was in the business of matching investors with borrowers who had properties which could be mortgaged. Arizona real estate practice generally uses deeds of trust, in which the lender obtains a "beneficial interest" in the property. In many cases, Centuras assigned the beneficial interests in these investments in percentages to various investors, and therefore never provided investors and other creditors with the original notes and mortgages.

Centuras became insolvent. It was placed in receivership by the Arizona Superior Court on December 7, 1987, pursuant to petition by the State Banking Department. Mary C. Short, Superintendent of Banks, was appointed Receiver. Appendix A at 32.[1]

A. Notice

There is no dispute that the Centuras investors were on

1. Citations to Appendices A-C refer to appendices to the Petition. Citations to Appendix 1 refer to the appendix hereto. Citations to the record below not included in the appendices are noted by item number from the Index prepared by the Superior Court, prefaced with a "D"; transcripts, added to the record below by supplement, are designated by "Tr." followed by the date of the hearing transcribed.

notice of the Receivership proceeding. Shortly after institution of the Receivership, copies of the Receivership Order were provided by the Receiver to all investors and borrowers of Centuras. Appendix A at 32. Petition 3 was also mailed to all investors. *Id.* Petition 3 requested authority to sell or abandon any interest the Receiver held in real property, which was specifically defined to include not only direct ownership but any "beneficial interest" in real property. Appendix C (Receiver's Petition 3 for Authority to Sell Real Estate or to Abandon Property Under Certain Conditions) at ¶ 1.[2]

However, because there were so many persons with potential interest in the proceedings (borrowers, investors, and other creditors), it was not practical to provide notice of all pleadings and other proceedings to everyone. Centuras had over 300 investors and borrowers, not counting other creditors. D. 128. As Thomas P. Sylvester, counsel for Petitioners in the trial court, described his experience:

> I was on that mailing list for awhile, and I begged to be taken off. . . . It is an inordinate amount of paperwork, all of which none of the petitioners as lay people would have a knowledge of the significance of them as they come in bits and pieces. And it would have cost them a fortune to have an attorney review everything that came in.

Tr. 12/21/93 at 17:7-19. Therefore, except for the early petitions discussed above, pleadings were routinely served only on parties

---

2. Petitioners' contention that Petition 3 did not give notice that the Receiver might release notes and mortgages because they were not "real property" is specious. Mortgages, and interests therein, are interests in real property. *See Fremming Construction Co. v. Security Savings & Loan Ass'n*, 115 Ariz. 514, 566 P.2d 315, 317 (App. 1977).

to the action, *i.e.*, those who made a formal appearance in the Receivership action and thereby requested copies of all materials filed with the Court in the course of its supervision of the receivership. *Compare, e.g.*, D. 29 (Notice of Appearance of Richard E. Chambliss, 2/19/88) *with* D. 42 at 7 (Service list for Receiver's Response to Snyder Motion, showing Chambliss, 2/26/88).

Many investors and other creditors sought the release of notes and mortgages from the Receivership to them. Appendix A at 32; *see, e.g.*, Ds. 9 (Petition for Relief from Permanent Injunction, Neurological Associates of Tucson); 121 (Stipulation, Reeder). In response to such requests, several judges supervising the Receivership entered orders releasing notes. *See* Ds. 28 (Hon. Norman D. Hall, Jr.); 370 (Hon. Gloria G. Ybarra); 422 (Hon. J. Kenneth Mangum); 461 (Hon. Robert P. Murphy, Pro Tem); 479 (Hon. Sherry Hutt). Those persons who participated in the Receivership proceedings received notice of such actions, either by service of the creditor's petition, the Receiver's response, or the court's minute entries approving release. *See, e.g.*, Ds. 67 (Stipulation and Order, showing service of stipulation prior to execution of Order by Court, re Wild Horse Ranch note, March 1988); 169 (Petition for Relief from Permanent Injunction, August 1988); 245 (Receiver's Response to Motion for Modification Filed by Merabank, Nov. 1988); 63 and 115 (Minute entries, March and June 1988). Thus, before the end of 1988, anyone participating in the Receivership proceedings would have been well aware that the Receiver was releasing notes with court approval.

B. Petition 19 And The Objection

On October 26, 1992, the Receiver filed Petition 19 for approval of the First Interim Accounting, covering the period December 7, 1987 through April 30, 1991. Appendix A at 33.

The petition was served on the full Receivership service list. D. 484 (Petition 19). After an initial order approving the accounting, D. 507, two investors objected based on lack of notice. D. 514 (Motion for Reconsideration). The Receivership Court required service on all investors, D. 520; the Receiver thereafter provided notice to 293 customers, investors and creditors of Centuras on February 16, 1993. D. 531 (Notice Concerning Receiver's Filing of Petition 19).

Following some skirmishing over discovery, Appendix A at 34, in late October 1993, Petitioners served their Objection to Receiver's Interim Accounting Petition 19. The Objection was 126 pages long (including a markedly abbreviated service list), and was accompanied by two volumes of over 200 exhibits measuring more than 4 inches thick. The gravamen of the Objection was a claim that the Receiver had improperly made preferential transfers by releasing notes and mortgages to those who did not have actual possession of the notes. Objection at 15 and 87.[3] Petitioners attacked virtually every release ordered by the Court over the nearly six year history of the Receivership. As a result of this alleged mismanagement, Petitioners sought to surcharge the Receiver and his counsel: "The Receiver should be held liable for the damages caused to the parties to the Receivership Estate as outlined in the Petitioners' Objection herein." Objection at 125.

The Receiver moved to dismiss the Objection on the grounds, *inter alia*, of immunity and laches. D. 564 (Motion to Dismiss). The Receivership court determined that the Objection was not well-founded for all the reasons advanced by the Receiver, and awarded sanctions:

---

3. Apparently due to its bulk, the Objection and its exhibits were not filed in the main court file, and therefore are not reflected in the index. They were filed as a supplement to the record, and are referenced herein as "Objection."

> The pleadings and objections of the objecting group, being without merit, have caused the receiver to spend funds in response. The immunity issue is well-settled law. The actions have unnecessarily expanded the scope of the proceedings, pursuant to Rule 11 and A.R.S. § 12.349, where pleadings are not filed in good faith and are unsupported by applicable case law.

Appendix 1, attached hereto, (Findings of Fact and Conclusions of Law) at 4a. The Findings of Fact and Conclusions of Law were signed by the Receivership court on May 18, 1994. Judgment was entered the same day, jointly and severally against Petitioners and their counsel, Sylvester. D. 590. Sylvester paid the award, and a Satisfaction of Judgment was filed. *See* Exhibit A to Motion to Dismiss the Appeal as Moot, filed December 23, 1994.

Petitioners appealed to the Arizona Court of Appeals, which affirmed the trial court in all respects. *See* Appendix A. A petition for review to the Arizona Supreme Court was denied on December 18, 1996. Petitioners then filed the Petition for Writ of Certiorari with this Court on March 18, 1997.[4]

---

4. The Petition for Writ of Certiorari was "filed" on March 18, 1997, exactly 90 days after the denial of review. The Petition showed as counsel of record Ethan Steele, who is not a member of the bar of this Court. According to Rules 9(1) and 34(1)(g), Rules of the Supreme Court of the United States, the Petition was therefore not "filed" and was untimely. Rule 14(5) does provide for cure of such technical deficiencies within 60 days; however, Respondent has received no information that such a timely cure was made. If not, the Petition should be dismissed.

REASONS FOR DENYING THE WRIT

PETITIONERS ARGUE ISSUES OF STATE LAW, AND FAIL TO CITE ANY ISSUE OF UNSETTLED FEDERAL LAW.

The Petition sets forth four purported Questions Presented. None present an issue appropriate for consideration by this Court. Respondent will address each "Question" in the order presented.

A. Does the Due Process Clause of the United States Constitution, Fourteenth Amendment, protect the general creditors of a state court receivership during the administration of the estate and disposition of their interests therein?

The proposition cited in this question is not subject to dispute; of course, due process applies. The question is how much process is due, or specifically, whether the efforts by the Receiver to give notice to Petitioners were adequate. Petitioners received notice of the Receivership, and the manner in which releases of beneficial interests would be handled (Petition 3). After that, if they wished to receive further information, they were required to take some affirmative steps to participate in the proceedings, in accordance with general receivership practice. *See* 2 Ralph Ewing Clark, A Treatise on the Law and Practice of Receivers (3d ed.) at § 532(a)(an intervenor is generally interested in any order fixing priorities or distribution), § 532(c)(one who merely presents a claim is not a party). *Cf.* Federal Rule of Bankruptcy Procedure 4001(a) (on motion for relief from stay, limited notice required).

This procedure was adequate under Arizona law. *See Sawyer v. Ellis*, 37 Ariz. 443, 448-49, 295 P. 322, 324-25 (1931) (creditor

not entitled to notice of all receivership activity). Petitioners purport to question whether it was adequate under federal law, but cite no authority that it was not.

The constitutional requirement of due process does not impose a fixed or immutable standard. The standard is fluid, varying by the weight of the competing interests presented. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 902-03 (1976). Here, Petitioners were given notice of the institution of the receivership, and an opportunity to appear and actively participate, if they so chose. This is all thatdue process requires. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 2974 (1985) (notice of pendency of class action); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318, 70 S. Ct. 652, 657 (1950) (notice to beneficiaries re accounting for common trust fund). There is no due process requirement of notice of each individual acion during the course of the proceedings to those potentially affected but who choose not to participate. *Cf.* Federal Rule of Civil Procedure 23(d)(2) (notice during course of class action discretionary). The adequacy of notice to creditors presents no important federal issue requiring this Court's attention.

B. Where a state court appointed receiver erroneously determines priorities and distributes estate assets to creditors who lacked a perfected security interest therein, without first providing notice and opportunity to be heard to the other general creditors, does it violate due process to deny these injured general creditors a legal remedy?

First, this question rests on an incorect factual premise. Assuming pursuant to the standard on a notion to dismiss that the allegations of the Objection are correct that improper distributions were made, notice and an opportunity to be heard were provided to general creditors. Those creditors who chose

to actively participate in the Receivership received notice of each alleged distribution, and had the right to appear and object.

Second, this issue is not one of federal law; it is an issue of Arizona state law. The claims made against the Receiver by Petitioners, which were dismissed, were common law claims for surcharge. These claims are governed by state law, and the defense of immunity to such claims is one of state law as well. *See Acevedo v. Pima County Adult Probation Dep't*, 142 Ariz. 319, 690 P.2d 38, 41 (1984) (distinguishing between state and federal law standards for judicial immunity). Petitioners cite no authority for the proposition that there is a due process component to such a defense.

Third, this traditional application of the law of immunity does not leave creditors such as Petitioners without recourse; if creditors wish to challenge the actions of a receiver, they can become participants in the receivership proceedings and receive notice of petitions for court approval of actions that might affect the distribution of receivership assets. They would then have the appropriate opportunity to appear and be heard, on a timely basis. *See Sawyer v. Ellis*, 37 Ariz. at 449, 295 P. at 325; *Academy Life Ins. Co. v. Odiorne*, 165 Ariz. 188, 191, 797 P.2d 727, 730 (App. 1990) (competing claimant in receivership has right to appear in claims proceedings and assert defense not asserted by receiver). Petitioners chose not to assert any objections until the Receivership had been underway for years, and many actions had been undertaken which cannot be undone. The well-settled law of immunity does not need to be altered so that Petitioners can avoid the consequences of having slept on their rights.

C. Does the fact that a receiver is under state court supervision confer upon the receiver absolute immunity against liability for negligence and breaches of fiduciary duty, where such injurious actions were taken without the notice to the injured general creditors that due process requires?

Again, this question assumes (erroneously) that some unstated standard of due process was violated by the requirement that creditors concededly notified of the proceedings actually participate in order to receive notice of specific receivership petitions.

Also, this question once again presents a question of state, not federal, law. As noted above, the scope of judicial immunity to a state law claim is governed by state law, and was properly resolved by the Arizona State Court of Appeals in its decision in this action.

Finally, it is important to note that, contrary to the implication of the Petition, the Arizona Court of Appeals did not determine that the Receiver was immune for any negligent conduct he might undertake. The immunity upheld was the traditional absolute derivative judicial immunity for actions taken pursuant to court order. Petitioners disregard the factual determination made by the trial court, and affirmed by the appellate court, that each action challenged in their Objection was taken pursuant to a specific court order. *See* Appendix 1 at 4a, and Appendix A at 38. This Court should not accept certiorari to review such a factual finding. *See* Rule 10, Rules of the Supreme Court of the United States.

D. Does it comport with due process standards to confer absolute immunity upon a receiver by virtue of there being a court order approving the receiver's action, where the court order was obtained by the receiver without providing notice and an opportunity for general creditors to be heard?

Again, this issue is not really presented by this case; creditors were notified of the Receivership and the means by which the Receiver would deal with requests for release (Petition 3). Those who chose to participate also received notice of specific proceedings; Petitioners did not bestir themselves to do so.

Once again, Petitioners argue issues of fact, regarding the alleged control wielded by the Receiver over information provided to the Court.[5] Petitioners boldly ignore the finding that the Receiver acted pursuant to Court orders, including the Order regarding Petition 3. As the Court of Appeals noted in its decision:

> The order required that the receiver provide notice to the court, investors of Centuras secured by such property, and to specific borrowers involved in the property.

Appendix A at 38. Petitioners admittedly received Petition 3, including its request that the court approve a specific notice

---

5. Petitioners also fail to provide this Court with any indication that an issue of federal law is presented. Petitioners cite two Supreme Court cases purportedly finding immunity not available where there was a lack of candor to the tribunal. In fact, both cases were decided on the basis that the allegations involved events preceding any judicial proceedings which might invoke the protection of judicial immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 2616-17 (1993) (pre-indictment investigation by prosecutor); *Malley v. Briggs*, 475 U.S. 335, 342-43, 106 S. Ct. 1092, 1097 (1986) (application for arrest warrant).

procedure. No objections were filed thereto by Petitioners. The Receiver followed the court-ordered procedure, and provided such notice, in obtaining approval of the actions of which Petitioners complain. The record further reflects that notice was additionally given to all who chose to participate in the general receivership proceedings, including general creditors. The Receiver did not completely control the information provided to the Court; rather, traditional methods of the adversary system were available to any sufficiently interested party.

Finally, Petitioners completely fail to provide any legal support for their argument that due process prevents the defense of immunity from applying unless each creditor received notice of every action affecting the assets of a receivership estate. In fact, the authority of this Court is contrary: "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not reach every beneficiary are justifiable." *Mullane v. Central Hanover Bank*, 339 U.S. at 319, 70 S. Ct. at 659-60 (addressing need for notice of institution of proceeding). Here, Petitioners concede that all were notified of the institution of the Receivership; those most interested in objecting, shown by their participation in the process, received notice of each action. Due process was more than satisfied.

The two state court cases cited by Petitioners do not support their position.[6] In an antique South Carolina case, the court

6. In their Statement of the Case, page 14, n.15, Petitioners also reference two federal cases supposedly supporting the need for notice. However, neither case even discusses the concept. *See Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 542 (9th Cir. 1987) (action alleging violation of state law not an impermissible collateral attack where court order did not address specific claims); *First Empire Bank v. Federal Deposit Ins. Corp.*, 572 F.2d 1361 (9th Cir. 1978) (discussing scope of federal banking statute).

addressed failure to give notice of the initial order appointing receiver. *Koester v. Citizens' Publishing Co.*, 154 S.C. 154, 151 S.E. 452, 452 (1930). Here, in contrast, Petitioners concede they received a copy of the Order Appointing Receiver.

Petitoners also rely on a recent Arizona case, which addressed at length the difference between qualified and absolute immunity. *See Adams v. State*, 185 Ariz. 440, 916 P.2d 1156 (App. 1995). Neither notice nor due process was addressed. Rather, the court emphasized the factors of whether the conduct challenged was done pursuant to court order, and whether the function was integral to the judicial process. *Id.*, 916 P.2d at 1160-61. The court determined that a social worker investigating potential adoptive parents, who was not court-appointed and did not act under the direct supervision of the court, was not entitled to absolute immunity.

In stark contrast, this case deals with a receiver. A receiver is wholly a creature of the court. *Stowell v. Arizona Savings & Loan Ass'n*, 93 Ariz. 310, 311, 380 P.2d 606, 607 (1963). As such, receivers' involvement in the judicial process has traditionally entitled them to immunity:

> [I]t is not a novel principle that a court-named receiver, as an instrument of the court that appoints it, may not be sued for damages for activities in carrying out its office. Long ago the Supreme Court explained: [a receiver] is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in custodia legis. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not allow him to be sued touching the property in his charge, or for any malfeasance as to the

> parties, or others, without its consent. . . . Davis v. Gray, 83 U.S. 203, 218, (1862) [sic; 1872].

Capitol Terrace, Inc. v. Shannon & Luchs, Inc., 564 A.2d 49, 52 (D.C. 1989). The Petition gives no reason why this Court should reconsider this long-standing doctrine.

CONCLUSION

Petitioners present no persuasive reason why this Court should review the decision of the Arizona State Court of Appeals. No issue of national importance or unsettled federal constitutional law is presented herein. Nor is there a question of substantial injustice; the sanctions awarded have already been paid by counsel below, who did not join in the appeal. If anything, considerations of justice weigh in favor of denying review: Petitioners seek to reopen years of the administration of the Receivership, after failing to take any timely steps to protect their alleged interests. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

NICHOLAS C. GUTTILLA
Counsel of Record
VICTORIA GRUVER
GUTTILLA & MURPHY
A Professional Corporation
Attorneys for Respondents
4150 West Northern Avenue
Phoenix, Arizona 85051
(602) 937-2795

APPENDIX 1 — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED MAY 18, 1994

BRUCE D. ALPER
BRUCE D. ALPER, P.C.
11811 North Tatum Blvd.
Suite 3031
Phoenix, Arizona 85028
Phone: (602) 953-7899
Fax: (602) 561-1722
Attorney I.D. No. 004812
Attorney for Receiver

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CV 87-32891

(Assigned to the Hon. Sherry Hutt)

STATE OF ARIZONA, ex rel. RICHARD C. HOUSEWORTH, Superintendent of Banks,

Plaintiff,

vs.

CENTURAS INVESTMENT COMPANY, INC.,

Defendant.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This matter came before the Court upon the following pleadings:

Appendix 1

1. Objection to Receiver's Interim Accounting Petition 19 filed by the Objecting Petitioners represented by attorney Thomas P. Sylvester, including their Petition included within said Objection, dated October 22, 1993.

2. Receiver's Motion To Dismiss Objection Filed By The Sylvester Group & For Sanctions, dated November 9, 1993.

3. The Objecting Petitioners' Response to Receiver's Motion to Dismiss, and Request for Written Findings of Fact and Conclusions of Law, dated November 29, 1993.

4. The Objecting Petitioners' Notice Of Amendment Of Petition Accompanying Petitioner's Objection To Receiver's First Interim Accounting, including their First Amended Petition, dated November 29, 1993.

5. Receiver's Reply To The Objecting Petitioners' Response To Receiver's Motion To Dismiss Objection Filed By The Sylvester Group & Their Request For Written Findings Of Fact And Conclusions Of Law, dated December 15, 1993.

6. Receiver's Motion To Dismiss The First Amended Petition Filed By Objecting Petitioners and Receiver's Motion For Security For Costs Regarding The Objecting Petitioners (Sylvester Group), dated December 15, 1993.

7. The Receiver's Motion For Award Of Attorney's Fees, Costs & Sanctions Against Thomas Sylvester And The Objecting Petitioners, dated January 21, 1994.

8. The Objecting Petitioners' Response To the Receiver's Motion For Award Of Attorney's Fees, Costs & Sanctions

Appendix 1

Against Thomas Sylvester And The Objecting Petitioners, dated February 8, 1994.

9. The Receiver's Reply To Objecting Petitioners' Response To Motion For Award Of Attorney's Fees, Costs & Sanctions Against Thomas Sylvester And The Objecting Petitioners, dated February 16, 1994.

FINDINGS OF FACT

Upon the pleadings and evidence presented, THE Court FINDS AS FOLLOWS:

1. The Receiver's description of "The Sylvester Group" refers to the following Objecting Petitioners who, through their attorney, Thomas P. Sylvester, have previously filed an Objection to Receiver's Interim Accounting Petition 19:

> L. Alston; ASIAPRINT; LTD.; Gloria Baron; Robert Basist; Mellisse Brydges; CANYON STATE EQUITY, a/k/a CANYON STATE EQUITY, INC.; Yolanda DeSoto; Dwaine Dirks; Elsie Dirks; Michael Dymond; Corine Frevert; Muriel Gray; Boniface Herrman; Patricia Karageorge; Steven Ketchel; Theresa Lauber; Karen Lawson; Lottie Lawson; Thomas Lawson; Jim Martin; Donna McConnell; Steven Nason; John Provost; Eugene Sanchez; Gregg Sasse; Don Sherbo; Marilyn Summers; Patricia A. Taylor; Evelyn Tinney; Richard Welker; and Suzanne Woods.

2. The Receiver has been operating pursuant to Court Orders. The objections to the application of law do not give rise to liability of the Receiver where, as here, the Receiver has adhered to the Court's Orders. The Objectors do not indicate in any way that the Receiver deviated from Court Orders. The Receiver has therefore not breached his fiduciary duty and is immune from suit.

3. There have been years of actions by the Receiver pursuant to Court Order which were not objected to by the now "objecting petitioners." Those complaints are now barred by laches. Creditors have received assets which may not now be retrieved. There is great prejudice to the receivership if a claim were now to go forward to raise an issue of protection for unsecured creditors.

4. Further, certain of the moving parties do not have clean hands. Objectors Sylvester, Ketchel, Herrman, and Canyon State Equity now present arguments inconsistent with prior pleadings and representations.

5. Gray, Sasse, and Herrman bring untimely objections.

6. The pleadings and objections of the objecting group, (the Objecting Petitioners), being without merit, have caused the Receiver to spend funds in response. The immunity issue is well-settled law. The actions have unnecessarily expanded the scope of the proceedings, in violation of the provisions of Rule 11 and A.R.S. § 12-349, in that the objectors' pleadings were not filed in good faith and are unsupported by applicable case law.

7. The Receiver's request for an award of attorney's fee in the amount of $14,425.00 is reasonable and the expenses of

$2,490.28 for WESTLAW computerized legal research time was reasonable and necessary under the circumstances and such expenses are allowable under Rule 11.

8. Pursuant to Rule 11, the Objecting Petitioners' pleadings were not warranted by existing law and were interposed to delay and expand the litigation.

9. The Objecting Petitioners did not appear to make any effort to determine the validity of their claims prior to filing their Objection or to reduce and narrow invalid claims after commencement of the action. The facts were available to assist the objectors prior to the filing of the action. There was no indication that the objectors are any less financially able to pay the fees and costs than the beneficiaries of the receivership who are the parties damaged by the actions of the objectors. There were no reasonable issues in conflict and the Receiver prevailed on all issues.

10. A sanction of $100.00 per person is reasonable and fair.

CONCLUSIONS OF LAW

1. The Receiver is immune from liability for all actions taken pursuant to Court orders. *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599 (11th Cir. 1985); *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298 (9th Cir. 1989).

2. The Objectors' claims are barred by laches.

3. Stephen (Steven) Ketchel, Boniface Herrman and Canyon State Equity have unclean hands. *Rhine v. Terry*, 111 Colo. 506, 143 P.2d 684 (1943).

Appendix 1

4. The Objectors are estopped. *Graham v. Asbury*, 112 Ariz. 184, 540 P.2d 656, 658 (1975).

5. The Objectors failed to comply with the procedure promulgated by the Court in its Order of March 8, 1993.

6. The Objections of Muriel Gray, Gregg T. Sasse and Boniface Herrman are barred by this Court's Order of March 8, 1993. On October 26, 1992 Receiver filed his Petition 19 For Approval Of First Interim Accounting & Report Covering The Period December 7, 1987 To April 30, 1991. The Court granted the Petition on December 9, 1992 and approved the First Interim Accounting. On February 1, 1993 the Court, by minute order, directed the Receiver to send a notice to those persons who had *not* previously received a copy of Petition 19, advising them of the procedure to follow if they wished to object to the First Interim Accounting, notwithstanding that it had been approved by the Court. The order provided that "All objections shall be filed in 30 days." On February 19, 1993 Receiver filed his Proof Of Mailing Of Notice Concerning Receiver's Filing Of Petition 19 & First Interim Accounting. This document, in the form of an affidavit executed by Deputy Receiver Judy Hudson, states that the required notice was sent on February 16, 1993. A copy of the Notice Of Filing Of Receiver's Petition 19 & Of Your Right To Object was attached to Ms. Hudson's affidavit. In compliance with this Court's order of February 1, 1993, the Notice recited that any objection to Petition 19 and the First Interim Accounting would have to be filed within thirty days of February 16, 1993.

Prior to the mailing of the Notice to investors, attorney Thomas Sylvester had filed various pleadings on behalf of Dirks and Roberts. On March 16, 1993 he filed a Notice of Appearance

on behalf of numerous persons, but Muriel Gray, Gregg T. Sasse and Boniface Herrman were not among those listed. The Notice of Appearance listed various persons as being represented by Mr. Sylvester, *except* Muriel Gray, Gregg T. Sasse and Boniface Herrman. The Notice did *not* include a statement that those persons were objecting to Petition 19 and the First Interim Accounting.

On March 8, 1993 the Court, by minute order, stated:

> "This ruling contemplates that the March 19, 1993 cut-off will be effective as to the identity of those objecting and not as to the full substance of the objections."

On April 16, 1993 Mr. Sylvester filed a Motion to Permit Investors Muriel Gray, Gregg T. Sasse and Boniface Herrman to File Objections to the Receiver's Accounting. The Receiver's Response was filed on April 21, 1993. On May 10, 1993 the Court impliedly denied this motion:

> "IT IS ORDERED as follows:
> Mr. Sylvester is referred to the Orders of March 8, 1992.[1] The purpose of discovery is to enable Mr. Sylvester's clients who have timely noticed objections, to prepare the substance of those objections. * * *"

By referring Mr. Sylvester to its Order of March 8th, the Court was reiterating that March 19, 1993 was the cut-off date for any claimant to file a notice that he objected to the accounting. Since Muriel Gray, Gregg T. Sasse and Boniface

1. The court obviously was referring to the *1993* order.

Herrman failed to comply with the earlier order, they are barred from contesting the accounting.

7. WESTLAW research expenses are recoverable. While there exists a split of authority on the recovery of computerized legal research charges, "A majority of Courts have found it to be a reimbursable expense." *In re Bank of New England Corporation*, 134 B.R. 450 (E.D. Mass. 1991). Those Courts which have denied recovery consider the expense part of overhead. This, however, is an unrealistic view. *Timberland Design Inc. v. Federal Deposit Insurance Corporation*, 745 F.Supp. 784 (D. Mass. 1990), *aff'd*, 932 F.2d 46 (1st Cir. 1991); *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581, 592 (D. R.I. 1983); *Harman v. Lyphomed, Incorporated*, 945 F.2d 969, 976 (7th Cir. 1991); *Steinlauf v. Continental Illinois Corporation*, 962 F.2d 566, 570 (7th Cir. 1992).

8. Receiver's Motion for Security for Costs is moot. However, in the event the Objecting Petitioners should file any further pleadings seeking affirmative relief against the Receiver the Receiver may reurge said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Receiver's Motion To Dismiss Objection Filed By The Sylvester Group & For Sanctions is granted as to both the original Objection and Petition and as to the First Amended Petition.

FURTHER ORDERED that this Court does not reach or take action in the context of this ruling on the alleged ethical issues regarding attorney Thomas Sylvester, except as to the consideration of sanctions.

Appendix 1

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Receiver is awarded his costs and attorneys fees specific to responding to the objection. The sanctions shall be assessed jointly against the objectors and their counsel, Thomas P. Sylvester.

DONE and ORDERED this *18th* day of *May*, 1994.

Hon. Sherry Hutt
JUDGE OF THE SUPERIOR Court